V. PAUL RAJ CHELLADURAI

v.

JABATAN TELEKOM MALAYSIA BERHAD & ORS.

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
MAHADEV SHANKAR JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-01-6-94]
3 APRIL 1997

PUBLIC SERVANTS: *Dismissal - Extraneous material, whether taken into consideration - Whether there is serious defect in decision-making process of disciplinary board - Whether decision-making process of disciplinary appeal board tainted*

ADMINISTRATIVE LAW: *Remedies - Certiorari - Application for - Whether filed out of time - Rules of the High Court 1980, O. 53 r. 1A - Whether appellant's prayer misconceived*

This was an appeal against the refusal of the High Court to quash the decision of the respondents in dismissing the appellant. The appellant had, on 30 August 1986, received a show-cause letter from the disciplinary board of the respondents ('the DB') in regard to an offence he was alleged to have committed. The appellant replied on 17 September 1986 with a letter denying the allegations against him but did not specifically request an official inquiry. On 19 November 1986, the respondents dismissed the appellant. On 5 September 1992, the disciplinary appeal board of the respondents ('the DAB') received an undated letter of appeal from the appellant which it rejected on 23 February 1993. On 23 March 1993, the appellant filed an *ex parte* notice of motion for leave to apply for certiorari. The only point raised by the appellant was that no oral inquiry was held to enable him to cross-examine his accusers. The respondents, however, contended that the DB was not obliged to hold an inquiry. In the result, the High Court summarily dismissed the appellant's application.

On appeal to the instant Court, the appellant contended, based on *Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis*, that the respondents had taken extraneous material into consideration in arriving at their decision to dismiss the appellant. The respondents, however, urged the instant court not to entertain the point as it was not raised in the Court below.

Held:
Per Mahadev Shankar JCA

[1] The facts of *Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman v. Setiausaha Suruhanjaya Pasukan Polis* were distinguishable from those of the instant case. In the former there was a trial in which the plaintiff there had not only pleaded the point but had also given *viva voce* evidence that the proper construction to be placed on the offending words was that prejudicial and extraneous material had been taken into consideration. In the instant case, there was no trial and everything went on affidavit evidence.

[2] For certiorari to be granted, the appellant had to show that there was a serious defect in the decision-making process of the DB. The proper time for applying for certiorari is within six weeks of the decision to dismiss (as envisaged by O. 53 r. 1A of the Rules of the High Court 1980). The appellant's application for *certiorari* was made more than six years too late.

[3] It was not open to the appellant to come to the Court for certiorari after having resorted unsuccessfully to the domestic appeal procedure. There was no complaint that the decision-making process of the DAB was tainted.

[4] The appellant's prayer as contained in both its notice of motion for leave and its substantive motion was misconceived as there is no entity by the name of "Jabatan Telekom Malaysia Berhad". The successor company to "Jabatan Telekom Malaysia" is "Syarikat Telekom Malaysia Berhad".

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PENGKHIDMAT-PENGKHIDMAT AWAM: *Pemecatan - Bahan-bahan tiada kaitan, samada dipertimbangkan - Samada terdapatnya kecacatan yang serius dalam proses membuat keputusan oleh lembaga tatatertib - Samada proses membuat keputusan oleh lembaga rayuan tatatertib tercemar*

UNDANG-UNDANG PENTADBIRAN: *Remedi - Certiorari - Permohonan untuk - Samada difailkan di luar masa - Kaedah-kaedah Mahkamah Tinggi 1980 A. 53 k. 1A - Samada pohonan perayu disalah-tafsirkan*

Ini adalah merupakan rayuan terhadap keengganan Mahkamah Tinggi untuk membatalkan keputusan responden dalam memecat perayu. Paryu telah, pada 30 Ogos 1986, menerima surat menunjukkan sebab daripada lembaga tatatertib

responden ('DB tersebut') berhubung dengan satu kesalahan yang dikatakan telah dilakukan oleh beliau. Perayu telah menjawab pada 17 September 1986 melalui sepucuk surat yang menafikan pengataan terhadapnya tetapi telah tidak secara khususnya meminta suatu siasatan rasmi. Pada 19 November 1986, responden telah memecat perayu. Pada 5 September 1992, lembaga rayuan tatatertib responden ('DAB tersebut') telah menerima surat rayuan yang tidak bertarikh daripada perayu yang mana telah ditolak pada 23 Februari 1993. Pada 23 Mac 1993, perayu telah memfailkan satu notis usul *ex parte* untuk kebenaran bagi memohon untuk mendapatkan certiorari. Satu-satunya perkara yang dibangkitkan oleh perayu adalah bahawa tiadak siasatan lisan telah dikendalikan bagi membolehkan beliau memeriksa balas orang-orang yang menuduhkan. Responden-responden namun begitu, menegaskan bahawa DB tidak berkewajipan untuk mengadakan satu siasatan. Oleh kerana itu, Mahkamah Tinggi telah menolak secara terus permohonan perayu.

Ketika merayu kepada Mahkamah ini, perayu telah menegaskan, berdasarkan *Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman lwn. Setiausaha Suruhanjaya Pasukan Polis*, bahawa responden telah menimbangkan bahan-bahan yang tiada kaitan dalam mencapai keputusan mereka untuk memecat perayu. Responden-responden, namun begitu, telah menggesa Mahkamah ini supaya tidak melayan perkara itu kerana ianya telah tidak dibangkitkan dalam Mahkamah ini.

Diputuskan:
Oleh Mahadev Shankar HMR:

[1] Fakta-fakta *Raja Abdul Malek Muzaffar Shah Raja Shahruzzaman lwn. Setiausaha Suruhanjaya Pasukan Polis* berbeza daripada fakta-fakta kes semasa ini. Dalam kes yang terdahulu terdapat suatu perbicaraan dalam mana plaintif di sini bukannya telah memplidkan perkara itu tetapi telah juga memberikan keterangan *viva voce* bahawa pembentukan yang wajar untuk diletakkan kepada perkataan-perkataan yang menyalahi adalah bahawa bahan-bahan yang tiada kaitan dan yang memudaratkan telah dipertimbangkan. Dalam kes semasa, tidak terdapat perbicaraan dan setiap perkara terletak pada keterangan afidavit.

[2] Untuk memberikan certiorari, perayu terpaksa menunjukkan bahawa terdapat ketidak-wajaran yang serius dalam proses membuat keputusan DB tersebut. Tempoh masa yang wajar untuk memohon bagi mendapatkan certiorari adalah dalam tempoh enam minggu daripada keputusan untuk memecatkan (sepertimana yang dijangkakan oleh A. 53 k. 1A Kaedah-kaedah Mahkamah Tinggi 1980). Permohonan perayu untuk certiorari telah dibuat lebih daripada enam tahun kemudiannya.

[3] Ianya tidak terbuka kepada perayu untuk memohon kepada Mahkamah bagi mendapatkan certiorari selepas gagal dalam prosedur rayuan domestik. Tidak terdapat aduan bahawa proses membuat keputusan oleh DAB adalah tercemar.

[4] Pohonan perayu sepertimana yang terkandung dalam kedua-duanya notis usulnya untuk kebenaran dan usul substantifnya telah disalah tafsirkan kerana tidak terdapat entiti bernama "Jabatan Telekom Malaysia Berhad". Syarikat pengganti kepada "Jabatan Telekom Malaysia" adalah Syarikat Telekom Malaysia Berhad".

[Rayuan ditolak.]

Cases referred to:

Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setia Usaha Suruhanjaya Pasukan Polis [1995] CLJ (JT); [1995] 1 CLJ 619 ***(dist)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor. [1996] 1 MLJ 261; [1996] 2 CLJ 771 ***(refd)***

Legislation referred to:

Rules of High Court 1980, O. 53 r. 1(2), 1A

Telecommunication Services (Successor Company) Act 1985, s. 9

[Appeal from High Court Malaya, Kuala Lumpur; Originating Motion No: R2-25-46-93]

For the appellant - Saran Singh; M/s. Saran Singh & Co.
For the respondents - Al-Baishah Haji Abdul Manan, PKP

JUDGMENT

Mahadev Shankar JCA:

This is an appeal against the refusal of the learned High Court Judge to quash a decision relating to the dismissal of the appellant from the Jabatan Telekom.

The appellant joined the Jabatan Telekom on 24 April 1955 as an unskilled labourer. In the course of his career he received salary increments and promotions in rank. On 20 May 1985 he received a notice from the Director of Telecoms that he was due to be retired on 31 December 1986 because he would have reached 55 years of age, and should therefore make ready to surrender the official quarters which he was occupying.

By a letter dated 30 August 1986 issued by the Chairman of the Disciplinary Board the appellant was duly informed that he was charged with an offence allegedly committed on 19 January 1984 and asked to show cause why he should not be dismissed from service. The offence alleged was that on the

day in question the appellant together with his superior and technician Mohd. Nordin bin Abdul Malek and Yahya bin Omar whilst installing a telephone at No. 4, Jalan Theatre, Ipoh, had received an "ang pow" from the occupant of RM20 and thereupon insisted on being paid another RM10. It was alleged he acted dishonestly and irresponsibly as a public officer and conducted himself in a manner likely to cause a reasonable suspicion that he had used his public position for his advantage and thereby made himself liable to dismissal. (See G.O. 4(2)(c)(ii), (f) and (g) of PU.U.(A) 203/80).

The appellant responded on 17 September 1986 with a four-page letter written in long hand. In short he stated therein that:

(a) the accusation was false;

(b) the occupant had requested them for an illegal extension to the telephone to be installed which Mohd. Nordin refused;

(c) that the appellant had explained to the occupant why the extension was illegal;

(d) the occupant had then proceeded to put several currency notes into Encik Nordin's pocket which Encik Nordin rejected, scolded the occupant, and told the appellant not to entertain the occupant's request and get on with the job at hand;

(e) after this was completed the occupant handed out three "ang pows" to Encik Nordin which the latter placed on the table. The occupant then took up the "ang pows" and offered one "ang pow" each to the appellant and Encik Omar which they also refused and left;

(f) the occupant was making a false accusation because:

(i) he was angry for being scolded by Encik Nordin for making an illegitimate demand;

(ii) when the occupant put the "ang pows" into the pockets of the appellant and Encik Omar they returned the same without any knowledge of its contents, so it was unjust to say that they asked for an additional RM10;

(iii) if the accusation was true why had the occupant not lodged an official report, and why the delay.

The rest of the letter went to emphasizing the denials and the appellant's clean service record. There was no specific request for an official inquiry.

A letter of dismissal followed on 19 November 1986. It reads as follows:

> Adalah dimaklumkan bahawa Lembaga Tatatertib di dalam mesyuaratnya pada 24/10/86, setelah menimbangkan dengan teliti pertuduhan ke atas tuan dan jawapan yang diberi oleh tuan dan lain-lain maklumat yang berkaitan, memutuskan bahawa tuan dikenakan hukuman BUANG KERJA mulai dari tarikh tuan menerima surat ini.
>
> 2. Peraturan 12(1) dan 13(1) Peraturan-peraturan Lembaga Tatatertib Perkhidmatan Awam 1972 (P.U.(A)48), menetapkan jika tuan tidak berpuashati atas keputusan Lembaga Tatatertib berkenaan tuan bolehlah merayu terhadap keputusan ini kepada Lembaga Rayuan Tatatertib Suruhanjaya Perkhidmatan Awam Malaysia, melalui Ketua Jabatan tuan di dalam tempoh 14 hari mulai dari tarikh penerimaan keputusan Lembaga Tatatertib ini.

By letter dated 9 January 1987 the Pensions Department notifed the second respondent that in view of the dismissal the pension benefits of the appellant had been revoked. The appellant got a copy of this letter.

As earlier stated, if the appellant wished to appeal he was required to do so through his Departmental Head within 14 days of the receipt of the dismissal notice.

On the date not made known to us, the appellant sent an undated appeal letter to the Disciplinary Appeal Board **(the Appeal Board)** through his Departmental Head. This letter was received by the Appeal Board on 5 September 1992 from the Ministry of Energy, Telecommunications & Posts. The appeal letter was not sent to this address and there is no explanation whatsoever as to who sent it there and when.

On 23 February 1993 the Appeal Board wrote to the appellant through the Ketua Setiausaha of the Ministry that his appeal had been dismissed.

On 23 March 1993 the appellant's solicitors filed a Notice of Motion *ex parte* for leave to apply for *certiorari* to quash the decision of "Jabatan Telekom Malaysia Berhad, or the Public Services Commission" contained in the letter dated 26 February 1993. The application was supported by the required statement under O. 53 r. 1(2) of the Rules of High Court 1980 and an affidavit **(the said affidavit).**

The *ex parte* application was opposed on 26 August 1993 on the ground it was two days out of time. Leave was granted nevertheless. The substantive application proper was then filed and the said affidavit was again used in support of the Motion.

In the said affidavit para. 12 the appellant deposed that:

12. Saya mengatakan bahawa, penamatkan kerja tersebut adalah salah atas alasan-alasan berikut:

a) Saya tidak diberitahu berkenaan tuduhan terhadap saya.

b) Penyelia saya tidak membuat aduan terhadap kerja saya.

c) Responden pertama telah gagal memberitahu saya untuk menghadiri mesyuarat atau enquiri sebelum keputusan dibuat.

d) Responden-responden telah mungkir Kaedah-Kaedah Keadilan.

e) Tindakan responden-responden tidak mengikut peruntukan tertentu.

f) Saya tidak diberi peluang untuk membela diri.

g) Responden-responden telah mengambil bukti-bukti yang tidak relevan.

h) Responden-responden telah gagal untuk menimbang fakta-fakta yang relevan.

i) Responden-responden tidak memberi saya amaran sebelum dibuang kerja.

Encik Ong Tee John who chaired the Disciplinary Board personally affirmed the affidavit in reply. As to para. 12 of the appellant's affidavit he said this:

5. Saya memohon kebenaran untuk merujuk perenggan 12(a) Affidavit Pemohon. Pemohon sebenarnya telah diberitahu mengenai tindakan terhadapnya, melalui surat Pertuduhan bertarikh 30.8.85 yang telah dihantar/dikemukakan kepada Pemohon. Sesalinan surat Pertuduhan tersebut dikemukakan di sini dan ditanda, sebagai ekshibit "OTJ-1".

6. Merujuk kepada perenggan 12(c)(d)(e)(f)(g) dan (h) Afidavit Pemohon, saya menegaskan selanjutnya bahawa melalui ekshibit "OTJ-1", Pemohon telah diberi peluang untuk mengemukakan sebarang representasi secara bertulis. Sehubungan dengan ini Pemohon telah mengemukakan representasi beliau melalui suratnya bertarikh 17/9/85. Sesalinan surat tersebut dikemukakan di sini dan ditanda sebagai ekshibit "OTJ-2".

7. Saya memohon kebenaran untuk merujuk perenggan 12(e) dan (i) Afidavit Pemohon. Saya menegaskan bahawa pihak Lembaga Tatatertib, Jabatan Telekom Malaysia, Kawasan Utara telah pun memberi amaran melalui surat pertuduhan bertarikh 30.8.85 (ekshibit OTJ-1) bahawa keputusan telah dibuat untuk mengambil tindakan tatatertib terhadap beliau di bawah Peraturan 26, Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980 dengan tujuan BUANG KERJA.

8. Perenggan 13 Afidavit Pemohon adalah dinafikan. Selanjutnya saya menegaskan bahawa pertuduhan-pertuduhan berkaitan telah dibuktikan terhadap Pemohon.

a

9. Oleh yang demikian, saya telah menasihati dan sesungguhnya percaya bahawa tuntutan Pemohon di dalam kes ini adalah tidak berasas dan sepatutnya ditolak dengan kos.

The Secretary of the Public Services Commission also filed an affidavit testifying to the receipt of the undated appeal letter earlier referred to.

b

It thus became patently obvious that the appellant's grounds (a), (f) and (i) were demonstrably false to the knowledge of the appellant. Ground (b) need not delay us here. Ground (c) is correct in so far as it goes because no inquiry was held but as pointed out earlier the appellant did not ask for one. As to grounds (d), (e), (g) and (h) the appellant gave no particulars whatsoever. These were sweeping allegations and bearing in mind the demonstrable falsity of grounds (c), (f) and (i) it is a reasonable inference that all the allegations were made by the appellant and his legal advisors in the spirit that if enough buckshot was fired some of the pellets might stick!

c

d

The appellant filed a final reply affidavit on 15 June 1986. Notwithstanding the benefit of legal advice the only point raised was that no inquiry had been held and no opportunity had been given to cross-examine the appellant's accusers. The shocking delay of over six years for the undated appeal to be disposed of was not touched upon. In view of the Setiausaha's affidavit we think it was incumbent upon the appellant to say when and to whom he had sent the appeal letter because until rebutted the only inference is that the appellant had sent his appeal letter not within 14 days as required but years later.

e

The matter then came on for hearing on 13 July 1994. The same Counsel who appeared in the Court below also appeared before us. The only ground urged by appellant's Counsel in the Court below to vitiate the dismissal was that no oral inquiry had been held to enable the appellant to cross-examine his accusers and the relevant witnesses and that it would have been impossible for the Disciplinary Board to make findings on credibility based on the written material.

f

g

The respondents' Counsel submitted that the Disciplinary Board was not obliged to hold an inquiry and cited the relevant cases. She further submitted that the appellant, "had not proved that irrelevant facts had been taken into consideration".

h

The appellant's Counsel's response was that purely based on the letter the Tribunal could not come to such a finding.

The learned Judge summarily dismissed the application. The appellant then applied for leave to appeal which was immediately granted the same day i.e. 13 July 1994.

i

The decision of the Court in *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v. Setia Usaha Suruhanjaya Pasukan Polis* [1995] CLJ (JT); [1995] 1 CLJ 619 **(the said decision)** was first published on 30 January 1995. In the dismissal letter there it was stated that in addition to the plaintiff's explanation, the Public Service Commission had also taken into consideration *"serta lain-lain maklumat"* in arriving at its decision to dismiss. This Court held that the proper construction to be placed on the dismissal letter was that it had taken extraneous material into consideration which the plaintiff had no opportunity to rebut. We therefore vitiated the dismissal, in all the circumstances of that case.

The said decision was not available when this matter was argued in the Court below. But by the time this appeal came on for hearing on 29 January 1997 appellant's Counsel having become aware of it, based his entire submission on the said decision. He contended that because the same phrase *"serta lain-lain maklumat"* had been used in the appellant's dismissal letter, we should allow his appeal and nullify his dismissal.

Counsel for the respondents submitted that as the point was not raised by the appellant in the Court below we should not entertain it. She could not take the matter much further except to say that the judgment in the Court below was confined to the only point raised there i.e. whether an inquiry was compulsory. Appellant's Counsel response to this was to rely on the only other authority in his bundle i.e. *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor.* [1996] 1 MLJ 261; [1996] 2 CLJ 771. Only the headnote was supplied from which it appears that by a majority of 2 to 1 the Court held that although ordinarily an appellant would not be permitted to argue a point not raised in the Court below, it all depended upon the justice of a case.

Neither Counsel could shed any light on why it took over six years to deal with the appeal, or even what happened to the other two members of the group who were involved in the original exercise.

Appellant's Counsel had strenuously contended that the said decision was on all fours, and we needed time to consider if he was right.

Having done so we are unanimously of the opinion that the point was devoid of merit.

In the said decision there was a trial in which the plaintiff had not only pleaded the point but had also given *viva voce* evidence that the proper construction to be placed on the offending words was that prejudicial and extraneous material had been taken into consideration. Instead of rebutting this accusation by calling evidence from the author of the letters, the defence Counsel elected

to submit no case and contend that the words were mere surplusage. Such conduct is tantamount to an admission that the plaintiffs version should be accepted.

In the matter before us there was no trial. Everything went on affidavit evidence. The words in the letter here were not made the subject of any specific complaint. More to the point the bare allegation that irrelevant matters were taken into account was specifically rebutted by the Chairman of the Disciplinary Board and the author of the dismissal letter. Thereafter the issue was not ventilated at all in the affidavits, and the submission of respondents' Counsel in the Court below that no extraneous matters were considered was not challenged by the appellant's Counsel in his reply. The said decision is clearly distinguishable on the facts.

There are other flaws in the appellant's case which nobody seems to have noticed. They are both glaring and fatal to the application.

The subject matter of the appellant's grievance is his dismissal on 19 November 1986. To be granted *certiorari* he had to show that there was a serious defect in the decision making process of the Disciplinary Board. The proper time for applying for *certiorari* was within six weeks of the decision to dismiss (see O. 53 r. 1A of the Rules of the High Court 1980). The application here was more than six years too late.

Secondly having unsuccessfully resorted to the appeal procedure it was not open to him to come for *certiorari* also. There is no complaint here that the decision making process of the Appeal Board was in any way tainted. In fact nowhere in the appeal letter is there any allegation that extraneous matters were taken into account by the Disciplinary Board. Indeed this letter refers to an explanatory letter written by the appellant dated 1 February 1985 which was never produced to us and which proves that departmental inquiries had preceded the disciplinary proceedings.

Thirdly the Notice of Motion for leave, and the substantive Motion both state the order sought is:

> untuk tujuan membatalkan keputusan Jabatan Telekom Malaysia Berhad atau Suruhanjaya Perkhidmatan Awam Malaysia dalam surat yang bertarikh 26 Februari 1993.
>
> (i.e. in order to quash the decision of Jabatan Telekom Malaysia Berhad or the Public Services Commission Malaysia in its letter dated 26 February 1993).

This prayer was totally misconceived because there is no such entity called "**Jabatan** Telekom Malaysia **Berhad**". The successor company to Jabatan Telekom Malaysia is correctly "Syarikat Telekom Malaysia Berhad". The

successor company is not a corporation but a public company which had nothing to do with the dismissal in 1986. Under the Telecommunication Services (Successor Company) Act 1985 (Act 322) the transfer date was 1 January 1987. As stated earlier the dismissal letter was dated 19 November 1986 and on the assumption that the appellant received this letter as late as 30 November 1986 he had to appeal within 14 days of the date of the receipt of this letter. Section 9 of Act 322/85 aforesaid required the appellant to exercise an option on or before 31 December 1986 in order to show that he had been accepted as an employee of Syarikat Telekom (M) Berhad. There is no evidence whatsoever of any such option having been extended to or exercised by the appellant. In any case had the decision of the Appeal Board been quashed as prayed for by the appellant the dismissal order by the Disciplinary Board would have been left intact.

The failure of Counsel for both parties to address their minds to these obvious defects does not speak well of them. The Courts are surely entitled to more meaningful assistance from its officers in the disposal of its business.

This appeal is dismissed with costs. The deposit shall be paid to the respondents towards taxed costs.

Reported by Alex KC Lee

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